UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 23, 2011

CBCA 2468-RELO

In the Matter of DELBERT C. STEORTS, II

Delbert C. Steorts, II, Killeen, TX, Claimant.

Richard G. Totten, Office of Counsel, Omaha District, United States Army Corps of Engineers, Omaha, NE, appearing for Department of the Army.

KULLBERG, Board Judge.

Claimant, Mr. Delbert C. Steorts, II, an employee of the United States Army Corps of Engineers (USACE), seeks review of the denial of reimbursement for certain expenses related to the sale of his previous residence. The USACE denied reimbursement for expenses that totaled $1431.50. For the reasons stated below, the claim is denied.

Background

Mr. Steorts sold his home in Colorado Springs, Colorado, as a result of his transfer to his new duty station in Texas under permanent change of station (PCS) orders dated December 21, 2010. The settlement statement (HUD-1) for the sale of Mr. Steorts' home showed that the cost of the appraisal, transfer tax, buyer loan closing fee, and lender's title insurance were costs to be paid by the borrower, but the seller, Mr. Steorts, paid those costs. On March 2, 2011, Mr. Steorts submitted his claim for expenses related to his PCS move. The USACE reimbursed Mr. Steorts in the amount of $14,880 and denied the remainder of his claim. The USACE denied reimbursement for the following expenses, which totaled $1431.50: appraisal, $400; transfer tax, $23.50; buyer loan closing fee, $300; lender's title

insurance, $400; administrative compliance fee, $228; and title services, $80. The title services included a $30 overnight fee and a $50 release tracking fee.

Discussion

It is well established "that the authority to reimburse relocation costs 'is grounded in subchapter II of chapter 57 of title 5, United States Code, and the regulations issued by the Administrator of General Services (under express Congressional charge) to implement that statute.'" *Bryan Trout*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727, at 170,991 (quoting *Teresa M. Erickson*, GSBCA 15210-RELO, 00-1 BCA ¶ 30,900, at 152,473). The Joint Travel Regulations (JTR), which apply to Mr. Steorts, limit reimbursement of certain costs related to the sale of a home to those "customarily paid by a seller of a residence at the old [permanent duty station]." JTR C5756-A.4. The Federal Travel Regulation (FTR), which also applies to Mr. Steorts, similarly states that reimbursement for certain costs related to the sale of real estate are allowed "provided they are normally paid by the seller of a residence at the old official duty station." 41 CFR 302-11.200 (2010) (FTR 302-11.200). The claimant has the burden of proof "to establish by a preponderance of evidence that a cost incurred in a real estate transaction is customarily paid in that locality." *Michael Vincelli*, CBCA 1828-RELO, 10-1 BCA ¶ 34,461, at 170,019. "An expense is 'customarily' paid if, by long and unvarying habitual actions, constantly repeated, such payment has acquired the force of a tacit and common consent within a community." *Bryan Trout*, 11-1 BCA at 170,991 (quoting *Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744, at 156,827 (2001)).

The USACE properly determined that Mr. Steorts is not entitled to reimbursement for the buyer's closing costs, which included the appraisal, transfer tax, buyer loan closing fee, and lender's title insurance. In those instances where a seller agrees to pay some portion of the buyer's closing costs, the seller can meet his burden of proof in the following manner:

> [T]here are various ways in which to meet the burden of showing that it is "customary" for a seller to assume a particular cost. These include showing that a cost is allocated to a particular party in a preprinted sales form, submitting letters from local realtors and brokers confirming that a particular cost is invariably assumed by the seller for the buyer, providing data showing that over the years a commanding percentage of sellers have contributed to buyers' closing costs, and the like. In contrast, letters from realtors simply asserting that many sellers contribute to buyers' closing costs do not establish that a practice is customary. *Dey*, 02-1 BCA at 156,827-28. A common occurrence does not necessarily rise to the level of a

> custom, although over time a custom may be determined to have evolved.

Erwin Weston, CBCA 1311-RELO, 09-1 BCA ¶ 34,055, at 168,412 (quoting *Joseph B. Wade*, GSBCA 15889-RELO, 03-1 BCA ¶ 32,128, at 158,815-16 (2002)). The HUD-1, which lists the closing costs paid by both parties to the transaction, shows that the appraisal, transfer tax, buyer loan closing fee, and lender's title insurance were closing costs to be paid by the borrower. Mr. Steorts has provided no evidence to show that payment of any portion of the borrower's closing costs by the seller was customary in the Colorado Springs area, and the USACE properly denied reimbursement for those costs.

Mr. Steorts contends that due to the housing market in the Colorado Springs area, he paid a portion of the borrower's closing costs, and doing so was "[n]ot historically customary, but currently customary." The following has been recognized when, due to market conditions, the seller pays some portion of the buyer's closing costs:

> That is, the fact that a seller paid the purchaser's closing costs does not in and of itself establish a customary practice. This is so even if, due to an economic downturn in the housing market, a claimant had to agree to pay the buyer's closing costs in order to sell the residence at all. The term "customarily" is unrelated to the strength or weakness of the real estate market; rather, it simply refers to what is usual, normal, habitual, or routine. *Michael K. Daniel*, CBCA 1762-RELO, 10-1 BCA ¶ 34,400; *Anthony J. Kress*, CBCA 877-RELO, 08-2 BCA ¶ 33,903, at 167,778.

Shen L. Lin, CBCA 1827-RELO, 10-2 BCA ¶ 34,521, at 170,252. At most, Mr. Steorts has established that current market conditions caused him to pay part of the borrower's closing costs, and a current practice subject to variations in the present condition of the market is not a customary practice.

Additionally, Mr. Steorts argues that he researched the JTR and contacted "District Real Estate" in order to determine that the cost of an appraisal was reimbursable. The JTR provides that "[c]ustomary costs of appraisal are reimbursable." JTR C5756-A.2. As discussed above, it was not customary for the seller to pay for the appraisal because appraisal costs were among the closing costs to be paid by the borrower. Although Mr. Steorts may have believed on the basis of his research or the advice of others that the cost of the appraisal would be reimbursed, this Board has recognized that it has no authority to reimburse an

employee for an expense contrary to statute or regulation. *Michael Vincelli*, 10-1 BCA at 170,020.

The USACE denied Mr. Steorts reimbursement for the administrative compliance fee because it was deemed to be in excess of the allowable amount of reimbursement for the realtor's commission. The JTR provides that "[a] broker's fee/real estate commission for services in selling the residence is reimbursable, but not in excess of rates generally charged for such services in the old [permanent duty station] locality." JTR C5756-A.1. The USACE argues that the customary rate for a real estate broker's commission in the Colorado Springs area is six percent, and Mr. Steorts was reimbursed for the maximum allowable broker's commission in the amount of $14,100, which was six percent of the sale price of his home. Mr. Steorts' claim for commission and fees paid to the real estate company was $14,328, which apparently included the administrative compliance fee of $228 plus the six percent commission of $14,100. Mr. Steorts has not shown that payment of the administrative compliance fee in addition to the broker's commission was customary. For those reasons, the Board finds no basis for allowing reimbursement of the administrative compliance fee.

Finally, the USACE determined that Mr. Steorts is not entitled to recover the cost of title services, which consisted of an overnight fee and a release tracking fee. Reimbursement for such title services requires showing the following:

> Title transfer companies routinely include among their charges a fee for courier delivery of documents when persons are not able to be physically present at settlement on a residence. A fee paid for delivery of documents is reimbursable if the fee meets a two-part test: The fee must have been incurred for services procured by the transferred employee or someone working with him (rather than the lender, since fees paid to a lender are considered part of a non-reimbursable finance charge), and the services must have been necessary for the transfer of the residence (rather than having been secured merely for reasons of personal preference).

David R. Williamson, CBCA 1825-RELO, 10-1 BCA ¶ 34,395, at 169,837. Although the HUD-1 shows that the title costs were to be paid by the seller, Mr. Steorts has not shown that those costs were necessary for the purpose of completing the sale of this home.

Decision

The claim is denied.

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H. CHUCK KULLBERG
Board Judge